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2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA

5 SAN FRANCISCO DIVISION

6
7 THE SIERRA CLUB, *et al.*,

8 Plaintiffs,

9 vs.

10 UNITED STATES NATIONAL MARINE
11 FISHERIES SERVICE and UNITED
12 STATES FISH AND WILDLIFE SERVICE,

13 Defendants,

14 and

15 UTILITY ACT WATER GROUP,

16 Defendant-Intervenor.

17
18 Case No. 3:14-CV-05141-EMC

19 JOINT STIPULATION AND PROPOSED
20 ORDER FOR A STAY OF THE
21 PROCEEDINGS AND RESETING CMC

22
23 COME NOW Plaintiffs, Defendants, and Defendant-Intervenor and file this joint
24 stipulated request for a stay of the proceedings in the above-captioned case. In support of this
25 stipulated request, the parties state as follows:

26 1. The claims in this case concern a joint biological opinion issued by the United
27 States Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service
28 (“NMFS”), pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2). The
biological opinion analyzes the effects of a final rule issued by the United States Environmental
Protection Agency (“EPA”) pursuant to Section 316(b) of the Clean Water Act (CWA), 33
U.S.C. § 1326(b), 79 Fed. Reg. 48,299 (Aug. 15, 2014) (hereinafter “Final § 316(b) Rule”).

1 Prior to filing the instant case, some of the Plaintiffs in this action petitioned for review of
 2 EPA's Final § 316(b) Rule pursuant to the judicial review provision of the Clean Water Act,
 3 which commits such actions to the jurisdiction of the appropriate Court of Appeals. That
 4 petition has been consolidated with five other petitions for review of that Rule; the consolidated
 5 petitions are currently before the United States Court of Appeals for the Second Circuit. *See*
 6 *Cooling Water Intake Structure Coalition v. EPA*, No. 14-4645 (lead case) (2d. Cir.).

7 2. On January 12, 2015, the Utility Water Act Group ("UWAG") moved to
 8 intervene in the instant litigation. *See* ECF No. 23. That unopposed motion was granted on
 9 February 11, 2015. *See* ECF No. 47.

10 3. On February 6, 2015, the petitioners and respondents in the pending petitions for
 11 review jointly moved the Second Circuit to allow petitioners' challenges to the biological
 12 opinion concerning the Final § 316(b) Rule to be brought in conjunction with their Clean Water
 13 Act challenges to the Rule. *See Exhibit A* ("Consent Motion"). As part of that motion, the
 14 Plaintiffs in this case committed to dismissing the instant litigation if and when the Second
 15 Circuit grants the Consent Motion and grants the intervention of the non-petitioning Plaintiffs
 16 from this case. *Id.* at ¶ 3.

17 4. On February 9, 2015, Federal Defendants moved to dismiss the instant litigation
 18 for lack of subject-matter jurisdiction, or in the alternative, moved to transfer the case to the
 19 Second Circuit. *See* ECF No. 46. Intervenor-Defendant UWAG is directed to file its motion to
 20 dismiss by February 18, 2015. *See* ECF No. 47. Plaintiffs' opposition to the motions are due
 21 March 4, 2015, and replies are due March 11, 2015. *Id.* The motions are set for hearing on
 22 April 2, 2015. *Id.*

23 5. There is a case management conference currently set for April 23, 2015, which
 24 triggers two other deadlines: (1) a case management report due by April 16, 2015; and (2) the
 25 March 12, 2015 deadline for paperwork pertaining to the parties' Alternative Dispute
 26 Resolution obligations.

27 6. Because of the potential for the Second Circuit's resolution of the Consent
 28 Motion to render further proceedings in this case unnecessary, the parties propose that the

instant litigation, including all deadlines referenced above, be stayed until the Second Circuit acts on the Consent Motion. Within ten days of the Second Circuit’s action on the Consent Motion, the parties will notify this Court of the decision and how it impacts this litigation. If the Second Circuit denies the consent motion or the non-petitioning plaintiffs are denied intervention, UWAG’s motion to dismiss will (if it has not already been filed) be due within 7 days after such denial; Plaintiffs’ response to the motions to dismiss will be due within 17 days of such denial; and all replies will be due 7 days after the filing of any such response.

Respectfully submitted this 13th day of February, 2015,

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PURSUANT TO STIPULATION, IT IS SO ORDERED. CMC is reset from 4/23/15

to 8/27/15 at 9:30 a.m. A joint CMC Statement shall be filed by 8/20/15.

2/17

—, 2015



Exhibit A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

COOLING WATER INTAKE)
STRUCTURE COALITION, et al.,)
)
Petitioners,) No. 14-4645(L) and
) consolidated cases 14-4657,
v.) 14-4659, 14-4664, 14-4667, and
) 14-4670
UNITED STATES)
ENVIRONMENTAL)
PROTECTION AGENCY, et al.,)
)
Respondents.)
)
)

**CONSENT MOTION FOR LEAVE TO AMEND PETITIONS TO ADD
NATIONAL MARINE FISHERIES SERVICE AND U.S. FISH AND
WILDLIFE SERVICE AS RESPONDENTS AND FOR EXTENSION OF
TIME TO FILE ADMINISTRATIVE RECORDS**

This matter is before the Court on Petitions for Review under Clean Water Act § 509(b)(1) of the United States Environmental Protection Agency’s (“EPA’s”) Clean Water Act § 316(b) Rule, 79 Fed. Reg. 48,299 (August 15, 2014) (hereinafter “Final § 316(b) Rule”). The parties hereby submit this Consent Motion requesting the following relief.

First, Petitioners Utility Water Act Group (“UWAG”) and Entergy Corporation, Cooling Water Intake Structure Coalition, and American Petroleum

Institute (collectively “Industry Petitioners”) and the Environmental Petitioners¹ jointly move for leave for Petitioners to amend their Petitions for Review to (1) include review of the biological opinion (“BiOp”) prepared by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (jointly “the Services”) regarding the § 316(b) Rule issued by Respondent EPA under the Clean Water Act (“CWA”), and (2) add the Services as respondents. Respondent EPA consents to this request.

Currently pending is UWAG and Entergy’s Motion to Amend Petition or Stay these Proceedings in the Alternative (ECF No. 42), which seeks to amend UWAG and Entergy’s petition to add the Services as respondents. UWAG and Entergy agree that their pending motion (ECF No. 42) will be moot if the Court grants this Consent Motion. UWAG and Entergy therefore ask the Court to defer acting on their motion and rule first on this Consent Motion. UWAG and Entergy will withdraw their pending motion (ECF No. 42) if the Court grants this Consent Motion.

¹ American Littoral Society, Environment America, Environment Massachusetts, Riverkeeper, Inc., Natural Resources Defense Council, Incorporated, Delaware Riverkeeper Network, Raritan Baykeeper, Inc., DBA NY/NJ Baykeeper, Hackensack Riverkeeper, Casco Baykeeper, Save the Bay - Narragansett Bay, Scenic Hudson, Inc., Sierra Club, Waterkeeper Alliance, Inc., Soundkeeper, Inc., Surfrider Foundation

Second, Respondent EPA moves the Court to extend the deadline for filing the certified list of documents comprising the record for judicial review until 90 days from the date of the Court's order on this motion. Petitioners consent to EPA's request.

As further support of this Consent Motion, the parties state as follows.

1. As part of the process for promulgating the Final § 316(b) Rule at issue in this case, EPA consulted with the Services pursuant to Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2). In May 2014, the Services provided EPA with a final Biological Opinion, concluding that the Final Rule was not likely to jeopardize the continued existence of these species or destroy or adversely modify designated critical habitat. EPA subsequently signed the Final § 316(b) Rule on May 16, 2014, and that rule was published in the *Federal Register* on August 15, 2014. Pursuant to 40 C.F.R. § 23.2, EPA promulgated the rule for purposes of judicial review on August 29, 2014. 79 Fed. Reg. at 48,300. EPA relied upon the Services' BiOp in the Final Rule and included the BiOp and associated documents in its administrative record for the Rule. *Id.* at 43,881.

2. The parties agree this Court has exclusive jurisdiction to review the Final § 316(b) Rule under CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1)(E). Industry Petitioners' and Respondent EPA's position is that this Court's jurisdiction under

CWA § 509(b)(1) also encompasses all issues that “inhere” in the controversy, including challenges to the Services’ BiOp, which is reviewable in its own right and “inheres” in the controversy. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (holding that “all objections” to the agency action “must be made in the Court of Appeals or not at all”); *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946 (9th Cir. 2005), *rev’d on other grounds by National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (holding that CWA § 509(b)(1) encompassed review of a FWS biological opinion accompanying an EPA CWA rule, even though challenges to biological opinions issued under the Endangered Species Act are otherwise ordinarily reviewed in district courts); *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) (“when a BiOp is prepared in the course of a FERC licensing proceeding, the only means of challenging the substantive validity of the BiOp is on review of FERC’s decision in the court of appeals”). See Respondent EPA’s Response to the UWAG and Entergy Motion to Amend Petition or Stay Proceedings in the Alternative and EPA’s Motion to Stay the Deadline for Filing the Certified List of Documents Comprising the Record for Judicial Review (ECF No. 85-1) at 8-13; and UWAG and Entergy Motion to Amend Petition or Stay Proceedings in the Alternative (ECF No. 42) at 5-7.

Environmental Petitioners' position is that although this Court has supplemental jurisdiction over the Services to review the BiOp, this Court does not have exclusive jurisdiction under CWA § 509(b)(1) to conduct this review. *See* Env. Pet. Response to UWAG Motion to Amend (ECF No. 79), citing *inter alia* the plain language of CWA § 509(b)(1); *Mianus River Preservation Comm. v. EPA*, 541 F.2d 899 (2d Cir. 1976)(§ 509(b)(1) strictly construed to apply only to the Administrator of EPA); *Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 556 (2d Cir. 1978) (supplemental jurisdiction under § 509(b)(1) is not exclusive).

Nonetheless, however this Court's jurisdiction is viewed, the parties agree that in this case this Court has and should exercise jurisdiction over the parties and claims as set forth in this motion. Therefore, it is appropriate to permit Petitioners leave to amend their petitions to include claims arising from the Services' BiOp.

3. Some of the Environmental Petitioners in this case also are plaintiffs in a pending case against the Services seeking review of the BiOp Opinion in the United States District Court for the Northern District of California, *Sierra Club v. National Marine Fisheries Service*, No. 3:14-CV-05141 (N.D. Cal.) (the "N.D. Cal. case"). Some of the plaintiffs in the N.D. Cal. case are not petitioners in this action (the "non-petitioner plaintiffs"). The Industry Petitioners and EPA agree not to oppose a motion to intervene by the non-petitioner plaintiffs to participate in this action to challenge the Services' BiOp, provided that (1) those plaintiffs file

their motion to intervene within ten days of an order granting the relief requested in this motion, and (2) those plaintiffs' intervention has no impact on the briefing format, the number of briefs filed, or the length of the briefs filed in this matter. Once the Environmental Petitioners' petitions are amended to add the BiOp claims and Services in this case, and the other plaintiffs are permitted intervention in this case, the plaintiffs in the N.D. Cal. case will dismiss that action.²

4. The Second Circuit Clerk's Office has advised counsel for EPA that the certified list of documents that comprise the record for review was due on January 28, 2015.³ Pursuant to Fed. R. App. P. 17(b)(1)(B), an agency may file a certified list of the documents and other materials comprising the record for judicial review, in lieu of filing the entire record. The record in this case is voluminous, and therefore EPA and, if the Court grants this motion, the Services intend to file a certified list of the documents comprising the record in this case.

² In the event that the plaintiffs in the N.D. Cal. case do not dismiss that action before the United States' deadline for filing a response to the complaint, the United States hereby reserves its right to file a motion to dismiss the complaint.

³ On January 23, 2015, EPA moved the court to stay the deadline for filing the administrative record. Respondent EPA's Response to the UWAG and Entergy Motion to Amend Petition or Stay Proceedings in the Alternative and EPA's Motion to Stay the Deadline for Filing the Certified List of Documents Comprising the Record for Judicial Review (ECF No. 85-1). If the Court grants all of the relief in this Consent Motion, EPA's prior motion to stay the deadline for the administrative record would be moot.

5. If the Court grants this motion and permits review of the BiOp as part of the challenges to EPA's Final § 316(b) Rule, the record for judicial review will necessarily include the administrative records of EPA and the Services. To insure that the record for judicial review is inclusive of all documents relevant to the petitions, and to allow additional time for EPA and the Services to complete the compilation and certification of their administrative records, EPA moves for an extension of time of 90 days from the date of the Court's order on this motion to file the administrative records of all three agencies with the Court. Petitioners consent to the granting of such motion.

WHEREFORE, the parties respectfully request that the Court grant this Consent Motion and issue an order (1) granting leave for Petitioners to amend their petitions to include review of the BiOp prepared by Services in connection with EPA's Final § 316(b) Rule and to add the Services as respondents; and (2) extending the deadline for filing the certified list of documents that comprise the record for judicial review until 90 days after the date of the Court's order on this Consent Motion.

Dated: February 6, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2015, I caused a true and correct copy of the foregoing Consent Motion to be served via the court's CM/ECF system on all registered counsel.

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s/Jessica O'Donnell

Jessica O'Donnell

United States Department of Justice